Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

ARTHUR F. GOOD,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: June 4, 2002

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20 pg

QUESTION PRESENTED

Where (1) a defendant's trial attorney does not file a notice of appeal after being asked by the defendant to do so, (2) defendant later (but months too late under the rules) files such a notice of appeal himself after learning that the lawyer has not done so, and (3) that appeal is later dismissed by the First Circuit as not timely filed under Fed. R. App. P. Rule 4, has the prisoner lost all his rights to appeal, or may he file an appeal out of time, or file a petition to vacate his sentence under 28 U.S.C. section 2255, in order to use either of those alternatives to recapture his post conviction rights?

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OPINION BELOW

The judgment of the Court of Appeals for the First Circuit is reproduced at the Appendix ("App.") at App. 1. The Order denying petitioner's (timely) request for an *en banc* rehearing is reproduced at App. 2.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals denying the timely request for an *en banc* rehearing was entered on March 6, 2002. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. section 1254.

STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Rule 4(b) Fed. R. App. P. provides that:

> In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or order being appealed; or

(ii) the filing of the government's notice of appeal.

Title 28 U.S.C. section 2255 provides that:

A prisoner in custody under a sentence of a court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

***

A 1-year period of limitation shall apply to a motion under this section. The limitation shall run from the latest of --

(1) The date the judgment of conviction becomes final . . .

STATEMENT OF THE CASE

A. Plea of Guilty, Sentence, and Untimely Appeal

The government brought this case against petitioner Arthur F. Good (hereinafter "petitioner" or "Good") charging commercial fraud and related offenses. On February 5, 1999, on advice of his attorney that the sentence imposed at the original sentencing would later be reduced under the "revise and revoke" process,[1] Good entered a guilty plea on the charges. On September 9, 1999, judgment was entered sentencing Good to a prison term of 83 months, supervised release for 36 months thereafter, and restitution in the amount of $2,161,694.00. [JA 57][2].

Just after the sentencing, Good asked his attorney to file an appeal. The attorney failed to do so. When Good learned of this several months thereafter as he sat in prison, he drafted his own notice of appeal, and sent it to the First Circuit on December 28, 1999, along with a letter to the clerk of that Court explaining [JA 68]:

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[1] "Revise and Revoke" is a procedure available in criminal cases pending in courts in the Commonwealth of Massachusetts for reconsideration of sentences after they are imposed. There is no such phrase anywhere in the federal system, nor can sentences be reduced in the federal system except by rendering substantial assistance to the government under Rule 35, Fed. R. Crim. P., an opportunity not available to petitioner Good.

[2] "JA" means the Joint Appendix in the First Circuit where documentation of our factual assertions can be found.

> This cover letter is necessary because I have requested my attorney, [*Name of Attorney Omitted in this Petition*] to file this appeal within the time allotment. He failed to do so. Please accept this notice on my behalf.
>
> Sincerely,
> Arthur F. Good

Thereafter, the Circuit Court dismissed the appeal as untimely because Good, acting without counsel,[3] did not show good cause for the late filing. The dismissal was entered on March 10, 2000. [JA 72].

B. Good's Petition for Relief Under 28 U.S.C. Section 2255

Within one year of that dismissal, Good, using new counsel, filed a petition to vacate his sentence upon the ground that his trial counsel had been ineffective, within the meaning of *Strickland* v. *Washington*, 467 U.S. 1267, 104

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[3] Good's trial attorney was really asleep at the switch. After Good had filed the appeal notice, that counsel received [JA 69] the following (routine) notice from the First Circuit Clerk (the upper case lettering is original), and he still did nothing:

> Please note Local Rule 12(b): . . . An attorney who has represented a defendant in a criminal case in the district court **WILL BE RESPONSIBLE FOR REPRESENTING THE DEFENDANT ON APPEAL**, whether or not the attorney has entered an appearance in the Court of Appeals, until the attorney is relieved of such duty by the court.

S.Ct. 3562, 80 L.Ed.2d 674 (1984). The 2255 proceeding alleged that his counsel had failed in a number of ways, including failing to file the appeal on time, giving inaccurate advice on various key points, and by having a serious, actual conflict of interest. Said conflict claim arose because Good's trial counsel was a long-time friend of another target (petitioner Good's former attorney) who trial counsel was really protecting throughout the case by (1) urging Good to plead guilty so that the other target, Good's prior attorney and trial counsel's long-time friend, could be spared prosecution, and (2) persuading Good to sign a waiver of the attorney-client privilege he (Good) had with his former attorney, so that said attorney could benefit by cooperating with the prosecutors by telling them what Good had told him about the events for which Good was charged.

The government moved to dismiss the 2255 proceeding as untimely, since it had not been filed within one year of the date of the judgment, September 9, 1999 (the date on which Good had been sentenced), which date the government argued was the "final" date since no timely appeal had been taken after that judgment had entered. Petitioner Good argued that because trial counsel had failed to file the requested appeal, (1) that failure was a separate ground for asserting ineffective assistance of counsel, and (2) the judgment sought to be vacated by the 2255 proceeding was not final because his right to appeal still existed (under Supreme Court case law we discuss further below), and thus the one year limitation on the filing of a 2255 proceeding had not commenced, much less run.

The District Court dismissed Good's petition as untimely. It thereafter granted a Certificate of Appealability [JA 103] and Good appealed. The First Circuit affirmed as follows without making any mention of the late-filed appeal or addressing any of our arguments to it (see below) that Good had not lost his appeal rights since counsel's failure to file the notice of appeal could not extinguish them:

> For the purposes of collateral review, appellant's conviction became final, at the latest, at the expiration of the time during which appeals may be filed under Fed.R.App.P. 4. The limitation period of section 2255 began to run when that conviction became final. The filing of an untimely appeal did not delay the commencement of the running of the clock. The dismissal of appellant's petition for relief is summarily **affirmed**. Local Rule 27(c).

[See, App. 1]

REASONS FOR GRANTING THE WRIT

The holding in this case is in direct and indeed abject conflict with the decisions of this Court and with the decisions of every other Circuit interpreting the decisions of this Court. *Rodriguez* v. *United States*, 395 U.S. 327, 89 S.Ct. 1715 (1969) held that where trial counsel failed to perfect an appeal on time despite the defendant's

request, the defendant should be allowed an appeal even if such an appeal is way past the normal time. In *Rodriguez* it was three years later. This Court stated:

> The judgment is reversed and the case is remanded to the District Court where petitioner should be resentenced so that he may perfect an appeal in the manner prescribed by the applicable rules.

Id., 395 U.S. at 332, 89 S.Ct. at 1718.

In *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1035, this Court made a clear reiteration of *Rodriguez*:

> When counsel fails to file a requested appeal, a defendant is entitled to a new appeal without showing that his appeal would likely have had merit.

Id. quoting *Peguero* v. *United States*, 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d (1999). The First Circuit's decision in Good's case is surely in conflict with these two cases.

Moreover, all Circuit decisions discussing this matter agree. *See, United States* v. *Hirsch*, 207 F.3d 928 (7th Cir. 2000) (Loss of appeal through counsel's failure to file such appeal cannot stand; therefore defendant was allowed to raise appellate issues by way of 28 U.S.C. section 2255, even when said 2255 petition is filed more

than one year after the judgment in relation to which counsel failed to notice an appeal.) *See also, Restrepo* v. *Kelly*, 178 F.3d 634 (2nd Cir. 1999) (counsel failed to file a requested notice of appeal; appeal allowed two years later, and one full year after time to file such an appeal had jurisdictionally run under New York law.)[4]

See also, Castellanos v. *United States*, 26 F.3d 718, 719 (7th Cir. 1994):

> Every court which has squarely confronted this question since Penson has held that failure to take an appeal, despite defendant's request, is ineffective assistance without regard to the probability of success on appeal.

Id., citing, *inter alia*, *United States* v. *Horodner*, 993 F.2d 191, 195 (9th Cir. 1993); *United States* v. *Davis*, 929 F.2d 554, 557 (10th Cir. 1991); and *Williams* v. *Lockardt*, 847 F.2d 1134, 1137, n.3 (8th Cir. 1988). Each of the cases cited above allows the late-filed appeal, or a habeas petition in its place. None takes the tone-deaf approach followed by the First Circuit in this case.[5]

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[4] The Second Circuit made the point that, on remand, the district court should ascertain whether in fact, as defendant had claimed, he had actually asked his counsel to appeal. If counsel had been so requested, then the appellate process was not over, as it had not yet begun, despite the expiration of the normal time period.

[5] Other applicable Circuit cases are: *Martin* v. *United States*, 81 F.3d 1083 (11th Cir. 1996) (a defendant is prejudiced where his attorney fails to file an appeal after being

C. The Importance of the Issue Involved

This is not an issue which quibbles at the margins. Rather, it goes to the heart of our criminal justice system. Ignoring the plea of a defendant to file an appeal strikes at "the adversary process itself" and renders it "presumptively unreliable." *Flores-Ortega*, 528 U.S. at 483, 120 S.Ct. at 1038.

No case, before Good's panel decision, has held that the breach of faith by defense counsel was simply the criminal defendant's "tough luck." It is nothing less than shameful for trial counsel to ignore a request to file a notice of appeal, which is, after all, nothing more than a one-page document which can be mailed to the clerk's office or, easier still, filed on the day of sentencing. Where such failure occurs, it is bad enough that an incarcerated defendant sits while his appeal has been thus stalled. However, that is

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requested to do so, even though the defendant plead guilty; defendant would be entitled to an out of time appeal); *Solis* v. *United States*, 252 F.3d 289 (3rd Cir. 2001) (where counsel fails to file an appeal after being requested to do so by the defendant, he is entitled *nunc pro tunc* to brief his direct appeal in full); *United States* v. *Peak*, 992 F.2d 39 (4th Cir. 1993) (where an attorney's failure to file an appeal when requested to do so by the defendant deprived him of his Sixth Amendment right to the assistance of counsel, judgment was vacated and new judgment entered from which appeal could be taken); *White* v. *Johnson*, 180 F.3d 648 (5th Cir. 1999) (reversing the district court's judgment and providing the writ of habeas corpus to issue unless Texas allowed petitioner to file out of time appeal, where counsel failed to file an appeal); *Ludwig* v. *United States*, 162 F.3d 456 (6th Cir. 1998) (counsel's failure to file a notice of appeal, in derogation of defendant's request, was a *per se* violation of the Sixth Amendment and petitioner should be entitled to a delayed appeal).

where the harm should stop. He should certainly not lose his appellate right altogether.

Finality in criminal cases is a valued goal for all the obvious reasons. Federal and state courts throughout this country can normally rest easy when invoking the finality rule against late cries for more consideration, in large part because whatever occurred at the trial of any case has been reviewed by an appellate court. But where such review has not been made because trial counsel has failed in the most ministerial of acts, finality must wait.

In New England, the bar is better than this. We can surely be made to file appeals when requested. The finality of justice in any one case can surely wait until any requested appeal has been filed and considered.

CONCLUSION

For the above-stated reasons, this Court should grant this petition and allow certiorari.

Respectfully submitted,

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Attorney for Petitioner
Arthur F. Good

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APPENDIX A

MANDATE

United States Court of Appeals
For the First Circuit

No. 01-2019

ARTHUR F. GOOD,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Campbell, Bownes and Cyr,
Senior Circuit Judges.

JUDGMENT

Entered: December 4, 2001

For purposes of collateral review, appellant's conviction became final, at the latest, at the expiration of the time during which appeals may be filed under Fed.R.App.P. 4. The limitation period of 28 U.S.C. § 2255 began to run when

that conviction became final. The filing of an untimely appeal did not delay the commencement of the running of the clock. The dismissal of appellant's petition for relief is summarily **affirmed**. Local Rule 27(c).

By the Court:
Richard Cushing Donovan, Clerk

By: JULIE GREGG
Appeals Attorney

Certified and Issued
As mandate under
Fed. R. App. P. 41
RICHARD CUSHING DONOVAN
Clerk

/s/ _____
Deputy Clerk

MAR 19 2002

Certified Copies: Judge Edward F. Harrington
Tony Anastas – Clerk of Court

CC: John J.E. Markham, Esq.
Stephen G. Huggard, Esq.
Dina Michael Chaitowitz, Esq.
John J. Farley, Esq.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 01-2019

ARTHUR F. GOOD,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before

Boudin, Chief Judge,
Campbell, Bownes and Cyr,
Senior Circuit Judges,
Torruella, Selya, Lynch and Lipez,
Circuit Judges.

ORDER OF COURT
Entered: March 6, 2002

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this

court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be **denied**.

By the Court:
Richard Cushing Donovan, Clerk

By: JULIE GREGG
Appeals Attorney

CC: John J.E. Markham, Esq., Stephen G. Huggard, Esq., Dina Michael Chaitowitz, Esq., John J. Farley, Esq.